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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF MARYLAND,	*	
Petitioner	*	
v.	*	No. 02-1649
EARMON ALVIN WALLACE, SR.,	*	
Respondent	*	

* * * * * * * * * * * * * * *

MOTION TO PROCEED IN FORMA PAUPERIS

Respondent, Earmon Alvin Wallace, Sr., who is indigent and who has been found to meet the qualifications for representation by the Office of the Public Defender for the State of Maryland, asks leave to proceed in *forma pauperis* pursuant to Rule 39.

Respondent's affidavit in support of this motion is attached.

Respectfully submitted,

Bradford C. Peabody

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STATE OF MARYLAND, *

Petitioner *

v. * **No.** 02-1649

EARMON ALVIN WALLACE, SR., *

Respondent *

* * * * * * * * * * * * * *

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, Earmon Alvin Wallace, Sr., being duly sworn, depose and say that I am the respondent in the above-entitled case. I swear or affirm under the penalty of perjury that, because of my poverty, I cannot pay the costs of this appeal. I further swear or affirm under the penalty of perjury that my answers to this form are true and correct.

Signed: Earmon Alvin Wallace Sr. Date: 4-10-02

1. Are you presently employed?

Yes

(a) If the answer is *yes*, state the amount of your salary or wages per month and give the name and address of your employer.

TSI $350 month Mental Station Hampstead, MD

(b) If the answer is *no*, state the date of your last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession, or other form of self-employment or in the form of rent payments, interest, dividends, or other source?

n/a

(a) If the answer is *yes*, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings accounts?

n/a

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

N

(a) If the answer is *yes*, describe the property and state its approximate value.

5. List the persons who are dependent on you for support and state your relationship to those persons.

6. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months? If yes, describe.

N/A

7. Have you paid -- or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? If yes, how much?

N/A

8. Have you paid – or will you be paying – anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form? If yes, how much?

N/A

9. State your address of legal residence.

1624 Hilltop Creek Dr

London, Ky 40741

Your daytime phone number: 423 877-3555

Your age: 35 Your years of schooling: 11 years

Your social security number: 216 84 5153

NO. 02-1649

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

STATE OF MARYLAND,

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v.

EARMON ALVIN WALLACE, SR.,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF MARYLAND

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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NO. 02-1649

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EARMON ALVIN WALLACE, SR.,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

Review is unwarranted, because the opinions of the lower appellate courts correctly applied this Court's decision in *United States v. Di Re*, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1948) to the particular facts of this case.

The Petitioner State merely relies on *dicta* in two cases for the proposition that there is a "conflict in the lower courts." (Pet. App. at 6). There is no such conflict.

STATEMENT OF THE CASE

At the suppression hearing, the State's witnesses testified to the following chain of events, in the early morning of July 9, 1999 in Annapolis, Maryland.

At about 3:00 a.m., Annapolis City Police Officer Jessica Hertik was in uniform, driving her marked patrol car on Forest Drive, when a car passed her "at a very high rate of speed," in the opposite direction. The speed limit was forty miles per hour.

Officer Hertik followed the car, at 90 miles per hour, and stopped it, after it went through a red traffic signal.

There were five occupants of the car, three males and two females. Respondent Wallace was in the rear seat, behind the passenger. Officer Hertik recognized three occupants, including Respondent. As Hertik was getting ready to write two traffic tickets and run a check on the driver's license, Officer Elizabeth Nelson arrived on the scene, with her K-9 dog. Officer Hertik told Officer Nelson of her "history with the occupants" whom she knew, and asked if Nelson would have her dog "scan the car."

Officer Nelson was a certified handler in the detection of drugs, and her dog was also certified proficient in drug detection. The dog was trained to swing his head back, scratch at the source of the drug and then sit. She testified that the odor of drugs lingers on paper money, and that her dog sometimes alerts to a single bill. If any type of drug is "smoked in the car," the odor is "going to stay in the car's upholstery for a good length of time." In this case, the dog "gave an alert" at both seams of the front, driver's side door. At no other point, "the rest of the way around the vehicle," did the K-9 give another alert.

Before Officer Hertik finished writing the traffic tickets, she was informed by Officer Nelson "that her dog had made a positive alert on the vehicle." Officer Hertik informed the driver "the dog hit on the car," meaning "[t]here is possibly CDS in the vehicle, and we would ask the occupants to exit one at a time so they would be searched."

One at a time, the occupants were removed from the car. The driver was "searched," first. Next, the front passenger was ordered out of the car. He said he could not get out, because he had taken his pants off. In the pocket of the front passenger's shorts, police found $1,155 in U.S. currency.[1] In the purse of a female occupant of the back seat, a knife was found.

The third occupant "searched" was Respondent. Respondent was in the right, rear passenger seat. Officer Jonathan Supko performed a "search" of Respondent. He performed a "search" of Respondent's outer clothing "for anything apparent, weapons, whatnot." Inside Respondent's pants in the groin area, the officer felt a large, hard, "balled up" object, which he said he knew was not a gun, knife, or other weapon. The officer handcuffed Respondent, "for safety purposes," after telling him he was "not under arrest." Officer Supko moved Respondent to a grassy area. Respondent seemed to be moving his hips back and forth. When he searched Respondent, again, the officer found the object had fallen down Respondent's pants leg to the cuff.

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[1] Later, after the money and arrestees were seized and taken to the police station, the K-9 "alerted to the money."

The object turned out to be a clear plastic sandwich baggie containing pieces of rock cocaine. At that point, Respondent was arrested.

At the suppression hearing, Respondent Wallace's trial counsel argued: (1) that, "The dog alerting to the car," does not "give you probable cause to search everybody in the car"; (2) that, while there was testimony of some prior contact between Respondent and Officer Hertik, there was no mention of "what that prior contact was or when it was"; (3) that, "there was no probable cause to search" Respondent; (4) that "They didn't search the car," when the dog alerted on the car, but Officer Hertik "made a decision that the occupants were going to be searched"; (5) that, if this search was legal, it would also be legal, for example, to search defense counsel and other occupants of a public trolley car, on their way to work, if a K-9 alerted to the car; (6) that this case involves not merely the search of a car but the occupants' "'bodily integrity,'" which is far more "'intrusive'"; and (7) that the search was unreasonable under the Fourth Amendment and the Court of Appeals of Maryland's decision in *Livingston*.[2]

The trial court denied the motion with a written memorandum opinion, filed on February 4, 2000. Respondent was later convicted of possession with intent to distribute cocaine.

On appeal to the Court of Special Appeals of Maryland, Respondent Wallace argued that this was no mere "frisk" or "pat down" but a full-blown "search ... for anything apparent, weapons, whatnot," as the officer admitted. This was done "without probable

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[2] *Livingston v. State*, 317 Md. 408, 564 A.2d 414 (1989).

cause" to believe that the right rear passenger was aware of, or participating in, any crime.

In the Court of Special Appeals, the State "argue[d] only probable cause to search and not that the search of appellant's person was allowable under *Terry*." (Pet. App. at 35a).

A three-judge panel of the Court of Special Appeals unanimously ruled that "a canine alert to a vehicle, without more, does not establish probable cause to arrest the passengers in the vehicle." (Pet. App. at 54a-55a). That court opined that in *United States v. Klinginsmith*, 25 F.3d 1507 (10th Cir. 1994) (containing *dicta* to the contrary), the Tenth Circuit "ignores the need to show a link between passengers of a car and suspicion of wrongdoing, as explained in *Di Re, supra* ...." (Pet. App. at 55a-56a).

On further review, the Court of Appeals of Maryland affirmed, in a five-to-two decision, concluding:

> As we have indicated we do not dispute that Bosco's positive alert provided evidence of a commission of a crime and that Bosco's alert, alone, provided adequate probable cause for the officers to search the automobile without a warrant. However, without anything more than the positive canine alert to drugs in the automobile somewhere, *i.e.*, something more particular linking any one passenger in the car, including respondent, to the drugs sniffed by Bosco, there was insufficient probable cause to search the passengers of the automobile in question in this case. A canine alert on the exterior of a vehicle does not support the proposition that the drugs potentially in the car are concealed on a *particular* occupant of that vehicle. When the police get all of the occupants

> out of the vehicle and find no drugs in the vehicle,[3] they cannot use a positive general canine scan of the car as authority to go further and search a non-owner/non-driver passenger. In the case *sub judice*, the search of respondent on these facts was unlawful. The motion to suppress should have been granted.

(Pet. App. at 23a).

REASONS FOR DENYING THE WRIT

THE COURT OF APPEALS CORRECTLY RULED THAT A CANINE ALERT TO A VEHICLE, WITHOUT MORE, DOES NOT ESTABLISH PROBABLE CAUSE TO ARREST OR SEARCH THE PASSENGERS IN THE VEHICLE.

The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

While the Fourth Amendment requires that searches be reasonable, based upon probable cause, and conducted pursuant to a valid warrant, it permits warrantless searches within certain well-defined exceptions. See generally, *New York v. Belton*, 453 U.S. 454, 457, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981).

In *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), this Court first recognized an "automobile exception" to the Fourth Amendment's warrant requirement. In 1981, police officers gained the authority to search the driver's person, the area within his or her control, and the car's passenger compartment,

---

[3] In this case, the occupants were searched before the vehicle was searched. (Pet. App. 28a).

including any open or closed containers, incident to a full custody arrest. *New York v. Belton*, 453 U.S. at 460.

This Court in *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977), held that police officers can compel the driver of a vehicle to exit the car, during a lawful traffic stop. The *Mimms* holding was extended, by *Maryland v. Wilson*, 519 U.S. 408, 410-11, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997), to passengers as well.

In *Wilson*, this Court acknowledged that the personal liberty side of the balancing test, (public interest in officer safety versus the individual's right to personal liberty), weighs heavier for passengers than for drivers. *Id.*, 519 U.S. at 413. Probable cause gives police the authority to stop the vehicle and detain the driver, but usually, no such justification for detaining or stopping the passenger exists. *Id.* at 413.

In a 1999 decision, *Wyoming v. Houghton*, 526 U.S. 295, 307, 119 S.Ct 1297, 143 L.Ed.2d 408 (1999), this Court held that passengers' property left within the vehicle, when the occupants are ordered out of the car, falls within the permissible scope of a *Carroll* Doctrine warrantless search.

Under the *Carroll* doctrine, then, vehicles may be searched without a warrant, provided the officer has probable cause to believe that a crime connected item or items are within the car. *Belton* searches, by contrast, occur incident to a full-custody arrest and thus are supported by both the probable cause to effectuate the arrest and the strong interest in officer safety.

In the case at bar: (1) at no time, either during the suppression hearing or on appeal, has the Petitioner State ever argued that the "search" of Respondent Wallace

was justifiable as a *Terry* frisk or pat down, *Wallace v. State*, 142 Md. App. 673, 686 n.7, 791 A.2d 968 (2002); (2) at no time, either during the suppression hearing or in the Court of Special Appeals did the Petitioner State ever argue that Respondent Wallace was "arrested," at the time the "search" of his person took place; and (3) on appeal to the Court of Appeals of Maryland, the Petitioner State, for the first time, argued that Respondent Wallace was searched "incident to arrest," and that the canine alert to the exterior of the vehicle in which he was a passenger provided sufficient probable cause, without more, to "arrest" the passengers.

Respondent's predicament was described by Professor LaFave, in his treatise on the Fourth Amendment, W. R. LaFave, *Search and Seizure* (2d ed. 1987), §3.6(c) at 49:

> "Not infrequently it happens that a person the police have probable cause to arrest is found *in the company of some other person* who, at least prior to that time, could *not* have been arrested for a crime and frequently was not even known by the police or suspected in any way." (emphasis added).

In the case at bar, at best, the police had probable cause to arrest the man who admitted being the driver. Respondent was merely the "other person" in their presence. *Id.*

Professor LaFave cites, as "the leading case in this area," *id.*, this Court's decision in *United States v. Di Re*, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1948). LaFave summarizes the facts and the holding, *Search and Seizure*, §3.6(c) at 49, as follows:

> "There, an OPA investigator was told by one Reed that he was to buy counterfeit ration coupons from one Buttitta at a certain place, so the investigator and a detective trailed Buttitta's car to the

designated place. There they found Reed in the rear seat holding counterfeit coupons and upon being asked he said he received them from Buttitta, the driver. Di Re, a passenger in the front seat, was also arrested on the theory that his presence indicated he was also implicated in a conspiracy to knowingly possess counterfeit coupons, but the Supreme Court concluded that probable cause for this arrest was lacking...."

This Court explained, in *Di Re*, 332 U.S. at 593, 92 L.Ed. at 219:

> "There is no evidence that it is a fact or that the officers had any information indicating that Di Re *was in the car* when Reed *obtained* ration coupons from Buttitta, and none that he *heard or took part in any conversation on the subject.*
>
> * * * *
>
> An inference of participation in conspiracy does not seem to be sustained by the facts peculiar to this case. The argument that one who 'accompanies a criminal to a crime rendezvous' cannot be assumed to be a bystander, forceful enough in some circumstances, is *farfetched when the meeting is not secretive or in a suspicious hide-out* but in broad daylight, in plain sight of passers-by, in a public street of a large city, *and where the alleged substantive crime is one which does not necessarily involve any act visibly criminal.* If Di Re had *witnessed* the passing of papers from hand to hand, it would *not follow* that he *knew* they were ration coupons, and *if he saw* that they were rations coupons, it would *not follow* that he would *know* them be counterfeit. Indeed it appeared at the trial to require an expert to establish that fact. *Presumptions of guilt are not lightly to be indulged from mere meetings.*" (emphasis added).

See People v. Carnivale, 329 N.E.2d 193, 194 (Ill. 1975), wherein the illegal warrantless arrest was based on "[h]is mere presence in the same hotel lobby with the other two defendants whom the police suspected of gambling activities;" *see also State v. Jenison*, 442 A.2d 866 (R.I. 1982), *infra*.

Professor LaFave's excellent discussion of the implications of *Di Re* continues:

"*Di Re* also makes it clear that *companionship* with an offender at the very time of the latter's criminal conduct is *not* inevitably sufficient to establish probable cause for arrest of the companion. This is *particularly true* when, as in *Di Re*, it is *very possible for the criminal conduct to be occurring without the knowledge of the companion*. Thus, for example, it is beyond peradventure that a person may not be arrested simply because he was *in the company* of another individual who cashed a stolen check or who had *a lid of marijuana in the glove compartment of his nearby car*.

When the nature of the ongoing criminal activity is such that its existence is *not evident to others in the vicinity*, it is then necessary to give careful consideration to those aspects of the extent and nature of the association which may indicate that the associate is also an accomplice. A most useful example is provided by *United States v. Chadwick* [433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977)], where there were grounds to arrest one associate but not another. One Machado and a woman accompanying him as his wife travelled via train from San Diego to Boston with a footlocker the authorities had good reason to believe contained marijuana. Upon arrival in Boston, Machado made a telephone call, and some time later they were met at the station by Chadwick. After the footlocker was loaded into his car and all three got into the car, agents arrested them all. *The court quite correctly held that there were not grounds to arrest Chadwick, for 'a non-criminal explanation of Chadwick's conduct is at least as likely as' a criminal one*. Specifically, the available facts made it no more likely that Chadwick was a participating 'mule' in the marijuana delivery than that he was simply a friend of the other two who kindly agreed to pick them up at the station." (emphasis added) (footnotes omitted).

Accord: State v. Neri, 290 So.2d 500 (Fla. App. 1974), wherein Neri and his codefendant were stopped, while "walking away from an unlighted house late at night," in a neighborhood known for "a number of burglaries." *Id.* at 501. Asked to identify himself, the codefendant said his identification was in his car. *Id.* When the codefendant opened the glove compartment, the police officer saw a "lid" of marijuana inside, and arrested both men. *Id.* Neri's arrest was held to be "without probable cause,"

which "taints and poisons the rest of the fruits derived subsequent to the unlawful arrest, including ... the confession" he gave the police. *Id.* at 502.

Similarly, in *Nast v. State*, 333 So.2d 103 (Fla. App. 1976), the police had no "probable cause" to arrest Nast, who had been sitting on a bench talking to another man, when the approach of the officer's patrol car caused Nast's companion to throw a plastic bag of marijuana over a seawall. *Id.* at 104. The court ruled that there was no showing of "constructive possession," where there was "no evidence on which the arresting officer at the time of the arrest could reasonably conclude that the appellant knew of the presence of the marijuana or had the ability to reduce it to his possession and control." *Id.* at 105.

In *United States v. Barber*, 557 F.2d 628 (8th Cir. 1977), the arrest of one Keller was "without probable cause," because it was based solely upon the fact that he drove his codefendant Barber to a liquor store, where Barber attempted to pass counterfeit money, as the driver waited in the car, parked where he "could easily see into the store," through the glass store front. *Id.* at 629-31. The court relied on the reasoning in *Di Re*, *supra*, and emphasized that Barber did nothing which could have "conveyed any overt indication of criminality" to Keller; therefore, Keller could not "be charged with an awareness" of the "criminal nature" of Barber's actions. *Id.* at 631.

A similar situation was presented, in *State v. Brazil*, 269 N.W.2d 15 (Minn. 1978), wherein the police had no probable cause to arrest the passenger in the defendant's car, after the driver entered a cafe and sold heroin, in a controlled buy. *Id.* at 16-17. The court observed that the police "must have concluded ... that since he was

with a drug peddler, he must be one himself, but mere suspicion doesn't satisfy the requirements of probable cause, and a person cannot be arrested ... merely because he is found in suspicious circumstances." *Id.* at 19 (citation omitted).

In the case at bar, as in *Di Re*, Appellant was not "meeting" with the others in a "secretive" place or "hideout." It was "very possible for the criminal conduct to be occurring without the knowledge of the companion." *Di Re*, *Neri*, *Brazil*, and *Chadwick*, all *supra*. There was no evidence that the smell of the cocaine was detectable by the human nose. In fact, "a non-criminal explanation of [Respondent's] conduct is at least as likely as" a criminal one, *Chadwick*, *supra*.

As the court noted in *Donaldson v. State*, 46 Md. App. 521, 420 A.2d 281 (1980)(film canister felt through clothing), the discovery of a hard object in Respondent's pants did not permit its seizure, even though drugs were suspected, in each case. This is particularly true, here, because the K-9 alerted only to the seams of the driver's door and not to the person of Respondent or any other occupant of the car.

It is also clear that, in the words of Officer Hertik, the police intended to "search" all the occupants. This was no mere "frisk" or "pat down." Officer Supko, who actually found the drugs, also called it a "search... for *anything* apparent, weapons, *whatnot*." (emphasis added). Under *Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) and the companion case of *Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968), a frisk consists solely of a limited patting of the outer clothing of the suspect for weapons, not contraband. In *Ybarra v. Illinois*, 444 U.S. 85, 93-94, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1993), this Court emphasized that

nothing in *Terry* can be understood to allow a search for "anything but weapons." *See* also *Florida v. Royer*, 460 U.S. 491, 510-11, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983)(Brennan, J., concurring); *Anderson v. State*, 78 Md. App. 471, 477-78, 553 A.2d 1296 (1989)(there is under the Fourth Amendment an ever-present requirement for the police to minimize even necessary intrusions); *Alfred v. State*, 61 Md. App. 647, 653, 487 A.2d 1228 (1985)(an unsuccessful frisk for weapons must not "degenerate into a search for and seizure" of something else); *Minnesota v. Dickerson*, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993)(wherein "the incriminating character of the object was not immediately apparent" from feeling a lump in the pocket, rather, it was found to be contraband only after a further, illegal, search).

Other Jurisdictions

In *People v. Fondia*, 740 N.E.2d 839 (Ill.App. 2000), the Court dealt with facts remarkably similar to those in the case at bar. After a lawful traffic stop, an officer requested a police canine unit, while he was conducting computer inquiries and warrant checks. *Id.* at 840-41. The driver and two passengers remained inside the car, as the dog "alerted to the odor of illegal substances" at "the rear seam of the driver's door." *Id.* at 841. The police had the driver get out of the car and told her "that the dog had alerted and that the occupants of the vehicle and vehicle itself would be searched." *Id.* The defendant Fondia, a backseat passenger, was removed from the car and told "that the dog had alerted and that [Officer] Gallagher was going to search him." *Id.* The officer put his hand into the defendant's pocket, "felt a metal tube and removed it from defendant's pocket." *Id.* "Based on his training and experience, Gallagher recognized the tube to

be a crack pipe. Gallagher then handcuffed the defendant and completed the search." *Id.* The tube field-tested positive for cocaine, and the defendant was arrested for possession of drug paraphernalia. *Id.*

It was "stipulated" that the traffic stop was lawful and that "the dog was properly trained and had a highly accurate record." *Id.* The trial court ruled that the canine alert gave the police "probable cause to search the vehicle...and all of the occupants." *Id.*

On appeal, the Illinois court agreed that the alert by a dog trained to detect contraband gave the police "probable cause to believe that controlled substances were somewhere *either* within the car *or* on the person of one or more of its occupants." *Id.* at 842. "However, *before Gallagher searched defendant's person, he could have - - and should have - - had the dog sniff defendant to see if the dog would again alert.*" *Id.* (emphasis added). Noting that a canine sniff is not a search for purposes of the Fourth Amendment, under *United States v. Place*, 462 U.S. 696, 707, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983), the court opined:

> *If a dog sniff had occurred and the dog alerted, then probable cause would have existed to search defendant's person. If, on the other hand, the dog did not alert after sniffing defendant but did alert as to one of the car's other occupants or as to the now-unoccupied car interior, then no basis would have existed to search defendant's person. By not conducting additional dog sniffs of defendant or the car's other occupants (which the officers had it entirely in their power to do), the officer willfully denied themselves this additional, critical information that would have sharpened their focus on whom to search, leaving themselves in a position of "willful ignorance."*
>
> *This posture of "willful ignorance" dissipates the reasonableness of the police conduct in this case*, given the nature of that conduct, which was a search of defendant's person, not merely a container within the car. In *Houghton* [526 U.S. at

> 303], the Supreme Court wrote of the "unique, significantly heightened protection afforded against searches of one's person and quoted the following from *Terry v. Ohio*, 392 U.S. 1, 24-25, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968): "Even a limited search of the outer clothing...constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience.'"

Fondia, 740 N.E.2d at 842-43 (emphasis added).

"However intrusive a dog sniff might seem, the search of one's pockets, as this Court explained in *Houghton*, [526 U.S. at 303], is far more intrusive," noted the court. *Fondia, supra* at 844.

In *Fondia*, the court distinguished cases such as *People v. Boyd*, 700 N.E.2d 444, 450 (1998), wherein an officer's smelling "the odor of burnt cannabis emanating from a lawfully stopped car" gave him probable cause to search the defendant, a passenger.

In *Boyd*, any passenger in the car wold have been fully aware of the presence of the drugs, because of the burning smell detected by the police officer. However, in *Fondia* as in the instant case, the presence of drugs was not apparent to the police officer, at all, any more than it could have been detected by any passenger's sense of smell. The smell of the drugs was apparent only to a specially trained dog.

In *Fondia*, that court also rejected "speculation" by "the appellate prosecutor" and the dissenting judge, that the trained dog sniffing a person might "be confused by body odors or proximity to a human being." *Id.* at 844. The majority noted that "the record is totally devoid of anything that would support such speculation" or "musings about dangers that could be caused by a dog's alerting to an individual." *Id.*

The *Fondia* court also distinguished *Horton v. Goose Creek Independent School District*, 690 F.2d 470 (5th Cir. 1982), wherein the Fifth Circuit found an unreasonable search of school children using a dog. In that case, there was "exploratory sniffing" by dogs of students in a school setting when no basis existed to focus on the students being sniffed. *Horton*, 690 F.2d at 473-74. "[T]he *Horton* court ... was concerned that the dog in that case touched and scratched at students," and *Horton* "specifically declined to address 'whether the use of dogs to sniff people in some other manner, *e.g.*, at some distance, is a search.' *Horton*, 690 F.2d at 479." *Fondia, supra* at 844.

An Illinois case, preceding *Fondia*, was *People v. Drake*, 683 N.E.2d 1215 (Ill.App. 1997). There, sheriff's deputies investigating gang and drug activities lawfully stopped a car driven by and registered to John Goodman, who was believed to be a member of the Vice Lord gang. *Id.* at 1217-18. The car had expired license plates. *Id.* The deputy believed that the defendant, seated in the front, passenger seat, "had a Vice Lord affiliation and the house they had just left was known as a Vice Lord house." *Id.* at 1218. An informant had implicated Goodman in smuggling weapons. *Id.* The deputies instructed the occupants to exit the car and patted them down, finding no weapons. *Id.* Goodman consented to a search of the car. *Id.* In the trunk, a deputy found a closed backpack containing a stolen handgun, and when he unzipped the bag, he also found two bags of marijuana. *Id.* All occupants of the car were arrested, and passenger Drake was charged with firearm and drug offenses. *Id.* at 1216-17.

At Drake's trial, the motion to suppress the evidence seized was granted, because "there was no probable cause to arrest" him. *Id.* at 1217. On appeal, that ruling was affirmed. *Id.*

The *Drake* court reasoned that the passenger "was not doing anything unusual or unlawful at the time of the stop," and

> The evidence showed that defendant might be associated with a gang and contraband was found in a locked trunk. However, there was no evidence presented that defendant in this case had any degree of dominion or control over this area of the vehicle or of the contraband or that he even knew what was in the backpack.

Id. at 1219. "Absent additional evidence connecting the defendant to the contraband either through his knowledge or possession, his mere presence as a passenger in the vehicle is insufficient to establish probable cause to arrest." *Id.* at 1220.

In *Rogers v. State*, 586 So.2d 1148 (Fla.App. 1991), an informant told police that Rogers would be coming to a particular restaurant, at a particular time, transporting cocaine in a burgundy mini-van, and that his girlfriend Shelly Tam would be with him. *Id.* at 1150. The police verified that Rogers owned such a van and that he had two previous narcotics convictions. *Id.* When Rogers drove the van up to the restaurant at that hour, police asked the driver Rogers and his four passengers to exit. *Id.* Codefendant Shelly Tam was the front seat passenger. *Id.*

A trained canine "alerted to the presence of narcotics in the seat pocket attached to the back of the front passenger seat," in which Tam had been sitting. *Id.* After finding envelopes of cocaine in the seat pocket, police arrested the driver Rogers. *Id.*

An officer asked Tam for her purse and searched it, finding more cocaine, and arrested her. *Id.*

The trial court ruled "that the discovery of the contraband in the van gave the police probable cause to arrest" both Rogers and Tam. *Id.* As to the driver Rogers, the appellate court agreed that the stop was lawful and that the "discovery of the cocaine in the seat pockets provided probable cause to arrest... Rogers." *Id.* at 1151. However, the Court ruled, there was "no basis for the arrest of Tam or the search of her purse." *Id.* 1150.

The appellate court reasoned that Tam "was standing some distance from the vehicle" and she did not give "permission to search her purse." *Id.* at 1151. Moreover,

> *The K-9 dog did not alert to contraband on or about Tam's person.* The informant, although stating that Tam would accompany Rogers, did not implicate her in the possession of contraband. There were no facts or circumstances which would give rise to probable cause that Tam had contraband in her immediate possession.
>
> If the search of Tam's purse is to be upheld it must be on the basis that the police officer had probable cause to arrest Tam for actual or constructive possession of the cocaine found in the van.

Id. at 1151 (emphasis added). The police had no reason to believe that Tam knew of "the presence of the cocaine," or knew of "the illicit nature" of what was in the seat pocket, or shared "dominion and control over it." *Id.* "Mere proximity to contraband, standing alone, is insufficient to establish constructive possession of the substance." *Id.* "In like manner, ***mere proximity to contraband is insufficient to create probable cause of constructive possession.***" *Id.* at 1151 (emphasis added), citing *Edwards v. State*, 532 So.2d 1311 (Fla.App. 1988), *review denied*, 542 So.2d 990 (Fla. 1989).

"Neither does reasonable cause for the searching of an automobile justify the search of the person of one of the occupants." *Id.*, citing *DiRe*, *supra*.

The majority in *Rogers* rejected the dissenter's claim that it had "applied the standard of proof for constructive possession at trial..., rather than the lesser probable cause standard" for making an "arrest with only reasonable grounds to believe a person has committed a felony." *Id.*, 586 So.2d at 1152. "The facts of this case do not support a reasonable belief as to any one of the elements of constructive possession and, therefore, no arrest was possible." *Id.*

As in *Fondia*, *supra*, the *Rogers* court distinguished cases such *Dixon v. State*, 343 So.2d 1345 (Fla.App. 1977), cited by the dissent. In *Dixon*, "the vehicle's occupants were, as a group, surrounded by smoke and the smell of marijuana, whereas in this case, we are dealing with an odorless white powder concealed in a pocket of the vehicle." *Rogers*, *supra* at 1152.

A similar result was later reached, by the same court, in *Rennard v. State*, 675 So.2d 1006 (Fla.App. 1996). The defendant was a front seat passenger in a car stopped at a roadblock set up to check for intoxicated drivers and to inspect driver's licenses and vehicle safety equipment. *Id.* at 1007. Ultimately, this check revealed that the driver had a suspended license and an outstanding arrest warrant. *Id.* While that computer check was taking place, a K-9 dog was brought over, and the driver agreed to let the deputy search the car. *Id.* The dog "alerted," while walking around the car, and "alerted on four areas" inside the car: "under the driver's seat, the space between the driver and passenger seats, a brief case on the back seat and a tool box in the hatchback

area." *Id.* Deputies found: "paraphernalia, including scales with methamphetamine residue, under the driver's seat" and "[p]araphernalia... in a tool box in the hatchback area." *Id.* Deputies originally arrested both the driver and passenger for drug violations. *Id.* Later, the defendant passenger was "charged only with possession of methamphetamine which was found in his pocket after he was arrested." *Id.*

On appeal, the Court ruled that, while the "search of the vehicle was lawful," there was no "probable cause for the arrest and subsequent search of the defendant," a passenger. *Id.* at 1008. "[T]here were no facts to support a reasonable belief that he had constructive possession." *Id.* Citing *Rogers*, *supra*, the Court noted that,

> The only paraphernalia located close to the defendant was found under the driver's seat by the transmission hump. One of the investigating deputies testified that the paraphernalia would not be visible to someone sitting in the front passenger seat. None of the deputies testified that they had any reason to believe that the defendant knew of the presence of the contraband in the vehicle. ***Mere proximity to contraband does not create probable cause of constructive possession. See Rogers*** [***supra***].
>
> The defendant was arrested solely because he was a passenger in the vehicle. ***Discovery of contraband in a vehicle does not, in and of itself, establish probable cause to arrest all the occupants of the vehicle.*** Because the defendant was searched pursuant to an unlawful arrest, the items seized from his pocket must be suppressed.

Id. at 1008 (emphasis added).

The defendant was a back-seat passenger in a car stopped for expired registration, in *State v. Riddle*, 531 N.W.2d 408 (Wis.App. 1995). The state trooper thought the defendant passenger made some suspicious movements, after the vehicle

was stopped. *Id.* When a check revealed that the driver's license was suspended, the trooper ordered him to follow his patrol car to headquarters, "to post bond." *Id.* at 409.

At police headquarters, the driver consented to a search of the car, and cocaine was found in the trunk. *Id.* "Immediately..., all four occupants of the vehicle" were arrested. *Id.* at 410.

The trial court found "probable cause for the arrest" of the passenger Riddle. *Id.* On appeal, the Court reversed, noting,

> While the circumstances within the arresting officer's knowledge need not be sufficient to make the defendant's guilt more probable than not, *the defendant's guilt must be more than a mere possibility for the arrest to be constitutional.* Further, in determining whether probable cause existed, we do not look to the officer's subjective beliefs, but apply an objective standard based upon the circumstances as they were at the time of the arrest.

Id. at 410 (emphasis added). Furthermore, the passenger Riddle was not in possession of the cocaine and did not "control" the trunk where it was concealed. *Id.* While Riddle's movements in the back seat were allegedly suspicious, he "never objected" to the stop and "never attempted to gain access to the trunk prior to the search." *Id.* Riddle's suspicious movements "had absolutely no relation to the cocaine in the trunk." *Id.* at 411.

Moreover, there was no "reasonable basis" for the arresting officer to conclude that Riddle was "an accomplice... engaged in a conspiracy" to possess or sell the cocaine. *Id.* Furthermore,

> At the time of the arrest..., there was absolutely no evidence to establish Riddle's complicity in such an offense, other than the fact that the four individuals were traveling together in the vehicle

> where the cocaine was found. This fact was not sufficient to provide [Trooper] Hotvedt with probable cause to believe that Riddle was engaged in a conspiracy. One's companionship with an offender who is breaking the law does not provide a law enforcement officer with probable cause to arrest the companion. *See United States v. DiRe* [*supra*] "This is particularly true when, [as here], it is very possible for the criminal conduct to be occurring without the knowledge of the companion." 2 Wayne L. LaFave, Search and Seizure §3.6(c), at 52 (West Supp. 1995).

Riddle, 531 N.W.2d at 411.

The driver owned and operated the car in which "the cocaine was concealed beneath the floor mat in the trunk," and while "probable cause may have existed" for the driver's arrest, that "did not provide [Trooper] Hotvedt with probable cause to arrest" his "companions, including Riddle". *Id.*

In *Riddle*, *supra* at 411, the Court distinguished *Jackson v. State*, 643 A.2d 1360 (Del. 1994), wherein a passenger was lawfully arrested for possession of marijuana and a metal pipe found in the passenger compartment. The *Riddle* court noted that the "arrest" of the passenger in *Jackson* was based upon "probable cause," because "'the contraband was found *in a non-secretive location*,'" which alerted all the occupants to its presence and illicit nature. *Riddle*, 531 N.W.2d at 411, citing with emphasis *Jackson*, 643 A.2d at 1365. By contrast, "there is no evidence that Riddle had a key to the trunk or that he ever had access to the trunk." *Riddle*, at 411.

The defendant was a passenger in a pickup truck lawfully stopped for a cracked windshield, in *People v. Foster*, 788 P.2d 825 (Col. 1990). The driver consented to the officer's examination of an all-terrain vehicle (referred to as a "motorcycle") in the back of the pickup. *Id.* at 826-27.

A "computer check" revealed that the A.T.V. was "reported stolen," and the officer arrested both the driver and the passenger for theft. *Id.* at 827. Incident to the arrest, a search of the passenger revealed cocaine in his wallet. *Id.* When the A.T.V. later turned out to have been erroneously reported as "stolen," even after it had been "recovered," the passenger was convicted only of drug possession. *Id.*

The trial court in *Foster* suppressed the cocaine, finding no reason to doubt "the good faith of the officers in believing that the A.T.V. was stolen," but holding that, "There's nothing to show that Mr. Foster had any knowledge of the actual theft or knowledge of the stolen nature of the vehicle," at the time the passenger was arrested for theft. *Id.* at 827.

On appeal, the State argued that when the officer learned, "in good faith," that the A.T.V. was listed as "stolen," police had "probable cause to arrest both... the owner and operator of the pickup truck, and the defendant, the passenger." *Id.* at 828. The Supreme Court of Colorado rejected the State's argument, reasoning that, "the mistaken information, even if true... did not rise to the level of reasonable grounds to believe that the defendant committed or was committing a crime." *Id.* at 830. The Court found *United States v. Di Re*, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1948) to be "the controlling precedent." As in *Di Re*, the passenger was with the driver, not in a "secretive" meeting or "suspicious hide-out," but on "a public street," and "the alleged substantive crime is one which does not necessarily involve any act visibly criminal." *Foster*, 788 P.2d at 828.

The *Foster* court relied in part on its decision in *Mora v. People*, 496 P.2d 1045 (Col. 1972). In *Mora*, an informer told police that one Fred Vigil would be driving a certain car containing stolen clothing. *Foster*, *supra* at 829. The police located that car, parked near a liquor store, with Vigil in the driver's seat. *Id.* The defendant Mora came out of the liquor store and got in Vigil's car, and they drove away. *Id.* The police stopped the car, "opened the trunk, and observed the stolen clothes described by the informer," and "arrested" both the driver and Mora for "burglary and receiving stolen property." *Id.* At the station house, Mora discarded a matchbook containing a partially smoked marijuana cigarette. *Id.* Mora was convicted of drug possession. *Id.*

On appeal in *Mora*, that Court found "no probable cause for his arrest." *Mora*, 496 P.2d at 1047:

> The record is devoid of evidence to show that the officers observed any criminal activity on the part of Mora or that Mora was connected in any way with disposition of the allegedly stolen merchandise. Moreover, the record fails to reveal that Mora was even aware of the presence of the clothing which was found in the trunk of Vigil's car.

The "only fact linking Mora" to the crimes for which he was arrested "was his physical presence in Vigil's car." *Id.* "Mora's physical presence in the automobile, in and of itself, did not provide probable cause to arrest," said that Court, citing *DiRe*. *Mora*, 788 P.2d at 829. "'Guilt by association has never been an acceptable rationale and it does not constitute probable cause to arrest.'" *Id.*, quoting *People v. Feltch*, 483 P.2d 1335 (Col. 1971), and citing generally, *Sibron v. New York*, 392 U.S. 40, 88 S.Ct.

1889, 20 L.Ed.2d 917 (1968), and *Henry v. United States*, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959). Moreover,

> Having arrested Mora illegally, the prosecution cannot now claim that the evidence obtained as a result of the arrest need not be suppressed because it was abandoned. *Rios v. United States*, 364 U.S. 253, 80 S.Ct. 1431, 4 L.Ed.2d 1688 (1960).

Mora, 496 P.2d at 1047; *Foster*, 788 P.2d at 829. "[P]robable cause requires reasonable grounds to believe that the *person arrested* has committed or is committing a crime." *Id.* (emphasis in original).

After conducting surveillance of room 249 of the Carlton House motel, police arrested several occupants for possession of a large quantity of marijuana, in *State v. Jenison*, 442 A.2d 866 (R.I. 1982). The officers at the scene were interrupted by the arrival of Joel Jenison, who parked his car, opened the trunk, tucked an object into his pants and placed his shirt over it. *Id.* at 870. Leaving his female passenger, codefendant Michele Cory in the car, Jenison knocked on the door of the same motel room and started to say something. *Id.* Within two minutes, Jenison returned to his car, opened the trunk, and took the object out from under his shirt. *Id.* An officer recognized that the object was a gun and officers arrested Jenison. *Id.* In the trunk, police found a briefcase containing $51,000 and two suitcases, one of which held $100,000. *Id.*

Codefendant Cory "remained in the car," while Jenison was advised of his rights. *Id.* Then, an officer asked her to step out of the car, and when she did, he "took possession of her pocketbook," made "a cursory search for weapons," and found none. *Id.* A later search of the pocketbook at the police station revealed six ounces of

cocaine. *Id.* at 871. Both the driver and passenger were charged with possession of cocaine with intent to deliver. *Id.* at 869.

As to the passenger Cory, the trial court ruled "that the first search of the pocketbook was permissible as incident to a valid arrest," but that "the second search" of the pocketbook required a warrant, as the exigent circumstances had dissipated. *Id.* at 873. On appeal however, the Court ruled that "the first search of the pocketbook" was not "permissible as incident to a valid arrest," because there was not "probable cause... to arrest" the passenger. *Id.* The Court reasoned that

> At the time Officer Tripp approached Cory and asked her to "step out of the car," she was merely an individual situated at the site where narcotics activity had taken place earlier in the afternoon. She was also the female passenger in a car driven by Joel Jenison, a person suspected of criminal activity. These facts, the only ones known to police at the time of Cory's arrest, do not establish probable cause. The fact that an individual is in the presence of or associating with others who are suspected of criminal activity does not, by itself, establish probable cause to arrest such person.
>
> In conclusion, we are of the opinion that Cory's mere presence in Jenison's car was insufficient to establish the existence of probable cause to arrest. The search of Cory's pocketbook at the Carlton, therefore, was not a permissible search incident to a valid arrest. *Id.* at 874 (citations omitted).

In *Woodbury v. State*, 730 So.2d 354 (Fla App. 1999), a passenger was searched, because a police canine alerted to the exterior of the passenger side front door. While the conviction was affirmed, the issue of lack of probable cause "was not raised or argued" in the trial court and was therefore "waived" on appeal. *Id.* at 355. However, both the concurring and the dissenting judges noted that a dog alert on a

vehicle, in and of itself, cannot authorize the arrest and search of all of the occupants of that vehicle. *Id.* at 355-59.

Cases distinguished

Unlike the case at bar, *People v. Hansen*, 761 N.E.2d 376 (Ill.App. 2001), *Dixon v. State*, *supra*, and *People v. Boyd*, *supra*, all involved a pervasive smell of burnt marijuana, making it perfectly obvious to a passenger that an illegal drug was in the car. Similarly, *Jackson v. State*, *supra*, involved drugs "in a non-secretive location" which was obviously known to the passengers.

This was also not a case like *Horton*, *supra*, wherein it was found unreasonable to use a police dog to touch and "scratch at" terrified school children. Use of a properly trained dog merely to sniff at an adult suspect is not a search. *See United States v. Place*, *supra* at 707; *Fondia*, *supra*.

This is also not a case wherein the State made any record, below, to support speculation that the properly trained dog used in this case would be unable to properly detect the smell of drugs on a person, as opposed to within a car. *See Fondia*, *supra* (rejecting such "speculation").

Moreover, as in *People v. Foster*, *supra*, this is not a case in which the "good faith" of the officers has any relevance, because, assuming the truth of all testimony provided by the police, the information known to the officers still "did not rise to the level of reasonable grounds to believe that the defendant committed or was committing a crime." *Id.* at 830.

This is not a case like *Wyoming v. Houghton, supra*, in which the contraband was found inside the car, contained in the personal belongings of a passenger. The search, here, was a search of the passenger's person, after he was removed from the car.

The Petitioner State, in the case at bar, cites *United States v. Klinginsmith*, 25 F.3d 1507 (10th Cir. 1994), for the proposition that when "a dog 'alerted' to the vehicle" exterior, "there was probable cause to arrest" both the driver and passenger. However, as that Court noted, "*Both* [the driver and passenger] *consented to a search of the car*," and the only contraband seized was 182 pounds of marijuana concealed in the "*trunk*". *Id.* at 1508-09 (emphasis added). Herein, the Petitioner State relies on *dicta* in that case. Moreover, the case at bar involves a search of the person of the passenger, not the trunk.

Similarly, in another case cited by the Petitioner State, *United States v. Garcia*, 52 F.Supp.2d 1239 (D.Kan. 1999), a federal district judge ruled that "Garcia consented" to the search, and he did not even contest the validity of his consent, on appeal. *Id.* at 1253. Here, the Petitioner State relies on the *dicta* in *Garcia*, which, in turn, relied on the *dicta* in *Klinginsmith*. *Garcia* also cites: *United States v. Shayesteh*, 166 F.3d 349 (10th Cir. 1998), however that was a case in which the driver was the sole occupant of the car; and *United States v. Williams*, 726 F.2d 661, 663 (10th Cir. 1984), which "was a luggage case more similar to *Royer* than to automobile cases," noted the Court of Special Appeals. (Pet. App. at 48a-49a).

To contradict the *Fondia* holding, the Petitioner State cites only one other case, *People v. Staley*, 778 N.E.2d 363 (Ill.App. 2002). The Petitioner overlooks the fact

that *Staley* was decided by the very same court as *Fondia*. Moreover, that court distinguished its prior decision in *Fondia*, which involved merely a drug dog's alert to the car's exterior, whereas in *Staley*, there were several reasons to suspect the passenger, individually, of possessing drugs, even before the dog alerted to the car:

> In this case, the trial court found that (1) defendant made a "very short visit" at 2 a.m. to a "known drug house"; (2) upon leaving that house, defendant returned to a car that was unusually parked; and (3) during the traffic stop, the officers observed that defendant's conduct was suspicious.... We conclude that *those facts, when viewed together with the dog's alert* on the passenger-side interior door panel, would lead a reasonably prudent person standing in the officers' shoes to conclude that defendant had committed the crime of possessing contraband. We thus affirm the trial court's determination that probable cause existed to search defendant.
>
> *In so concluding, we fully agree with the trial court's analysis of our decision in Fondia and the court's determination that this case is distinguishable.*

Staley, 778 N.E.2d at 367-368 (emphasis added).

Citing only the *dicta* in two cases, the Petitioner strains to find some "conflict in the lower courts" for this Court to "resolve." (Pet. App. at 6). There is no such conflict.

Maryland cases

Respondent's trial counsel cited *Livingston v. State*, 317 Md. 408, 564 A.2d 414 (1989), in support of his argument that the police lacked probable cause to search him. (Pet. App. at 619).

In *Livingston* at 408, the Court described the facts, as follows:

> Petitioner, Wesley Warren Livingston ("Livingston") was one of three occupants of an automobile speeding southbound on I-95, in

> Cecil County, Maryland. The car was stopped shortly after midnight by State Trooper Lawrence Nelson ("Nelson"). Livingston, who was not the owner of the vehicle, was seated in the backseat. Notwithstanding the darkness of the hour, the trooper, with the aid of his 30,000 candlepower flashlight, managed to discern two marijuana seeds located on the right front floorboard of the car. Nelson arrested each of the car's occupants for possession of the seeds. During a search incident to the arrest, Nelson discovered cocaine and marijuana in Petitioner's pocket.

That Court concluded that, when he "spotted the seeds in the beam of his flashlight, the trooper had probable cause to believe that a misdemeanor -- possession of marijuana -- was being committed in his presence. But *which* of the vehicle's occupants was committing the misdemeanor?" *Id.* at 413 (emphasis added). In short, the mere presence of the drug was "insufficient to inculpate Livingston, a rear seat passenger ...." *Id.* Livingston's arrest "lacked probable cause," and the evidence seized was tainted by the illegal arrest. *Id.*, 317 Md. at 416.

In *Collins v. State*, 322 Md. 675, 589 A.2d 479 (1991), Collins and four other black men were standing next to a Mustang automobile, in the driveway of a car dealership, at 3:00 a.m. *Id.*, 322 Md. at 677. A police officer stopped to investigate. *Id.* The men said they were looking at BMW's for sale. *Id.* One of the men, Steven Lewis, identified himself as the driver of the Mustang. *Id.* Shining a flashlight into the car, the officer saw on the back seat a black plastic 35 mm film container, which he knew was commonly used to contain drugs for sale. *Id.* The officer asked another of the men, Kevin Parker, to retrieve the film cannister and to say what was in it. *Id.* at 677-78. Parker answered, "I don't know; it is not mine." *Id.* at 678. Asked to open it, Parker did so, but he "attempted to conceal its contents 'by cupping his hand over top

of it.' He again stated that he did not know what was in the container." *Id.* Inside the container were over twenty individually wrapped cellophane packets of cocaine. *Id.* The officer arrested all five men, and in a separate trial, Collins was convicted of possessing the drugs. *Id.*

On appeal, the Court of Special Appeals affirmed, but the Court of Appeals of Maryland reversed, in light of *Livingston*. *Collins*, *supra*. That Court cited several defects in the State's evidence of probable cause to arrest, including that there was no evidence that Collins, even if he was a passenger,

> *knew* the suspected cocaine was in the back seat of the car. *Even if the police had probable cause to arrest Lewis or Parker for unlawful possession, there was no probable cause to arrest Collins.* As there was no evidence which *criminally linked* Collins to either the car, or *to the film canister*, there was no probable cause to believe that he committed or attempted to commit a felony as required by Art. 27, §594B.

Collins, 322 Md. at 682-83 (emphasis added).

The State in this case relied in part on *Lee v. State*, 311 Md. 642, 537 A.2d 235 (1988). In *Lee*, the search of a gym bag preceded the arrest of two persons, but the search was held "incident to a valid arrest, inasmuch as there was probable cause to support an arrest at the time of the search." *Id.* at 668.

Lee is easily distinguished from the instant case, because in *Lee* an informant told police that both of "two suspects had bragged that they had done a Robbery" of a particular liquor store, and "the two responsible" would be found at certain tennis courts, "with a small blue bag that would have a handgun." *Id.* at 649. When police observed the individuals matching the informant's detailed description, at the tennis

courts, they watched as "each of the two" suspects "separately held the same gym bag." *Id.* at 646,651.

In *Lee*, unlike in the case at bar, the police had ample probable cause to arrest each person, individually. There was absolutely no issue in *Lee* involving a mere companion or passenger of a person suspected.

A recent Maryland case is *State v. Funkhouser*, 140 Md. App. 696, 782 A.2d 387 (2001).

Funkhouser was the driver and sole occupant of a vehicle stopped for turning right at a red traffic light without coming to a complete stop, by detectives who had received a "tip" that he was in possession of a large quantity of cocaine. *Id.*, 140 Md. App. at 701-02.

The question of whether or not Funkhouser consented to the search of the car was in dispute, at the suppression hearing. Funkhouser was ordered out of the car. *Id.* at 707.

After a detective made a radio check of Funkhouser's driving record and any outstanding warrants, he had "a trained and certified cocaine-sniffing canine" scan the exterior of the car, and the dog "made a positive alert at both the front driver's side door and the front passenger's side door." *Id.* at 708.

After a search of his vehicle proven unproductive, the detectives removed the "fanny pack" which Funkhouser had buckled around his waist, unzipped it, searched it, and found cocaine. *Id.* at 701.

At the suppression hearing, "[t]he only theory of justification advanced by the State" for seizing the fanny pack was "that Funkhouser, by virtue of his recent presence in the vehicle, was for *Carroll* Doctrine purposes a mere extension of the vehicle." *Id.* at 712. The Court of Special Appeals ruled that,

> there is no case, state or federal, that has ever stretched the perimeter of a *Carroll* Doctrine search to embrace a *former occupant* of a vehicle who is at the moment of search already *outside* the vehicle. There has *never* been a *Carroll* doctrine search of a *person.*

Id. at 712 (emphasis added).

That Court called the State's argument "indistinguishable" from that rejected by this Court in *United States v. DiRe, supra.*

Moreover, the Court of Special Appeals noted that *Wyoming v. Houghton, supra*, is "totally unlike" Funkhauser's case, because *Houghton* validates the search of "'a passenger's personal belongings *inside an automobile.*" *Id.* at 714-15, (emphasis added), quoting *Houghton*, 526 U.S. at 297. The belongings must be "*found in the car.*" *Id.* (emphasis added), citing with emphasis *California v. Acevedo*, 500 U.S. 565, 572, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991)("'containers *in cars* could be searched without a warrant because of *their presence within the automobile'*"); and *United States v. Johns*, 469 U.S. 478, 479-80, 105 S.Ct. 881, 83 L.Ed.2d 890 (1985) ("'if police officers have probable cause to search a lawfully stopped vehicle, they may conduct a warrantless search of any container *found inside* that may conceal the object of the search').

The Court of Special Appeals emphasized that the *Wyoming v. Houghton* opinion "is fleshed out" in the concurring opinion of Justice Breyer, 526 U.S. at 308, who explained that the rule "does *not extend* to the search of a *person* found in that automobile," inasmuch as "*the search of a person, including even "'a limited search of the outer clothing,'" is a very different matter in respect to which the law provides "significantly heightened protection.*" *Id.*, 140 Md. App. at 715-16 ("emphasis added"). Justice Breyer noted that "*it would matter if a woman's purse, like a man's billfold, were attached to her person. It might then amount to a kind of outer clothing*," citing *Terry v. Ohio*, *supra* at 24, *which under the Court's cases would properly receive increased protection. Id.*, 140 Md. App. at 716 ("emphasis added").

In *Funkhouser*, "the 'fanny pack,' strapped around the waist of Funkhouser, was as much a part of Funkhouser's outer clothing as was the overcoat worn by John Terry in *Terry v. Ohio*." *Id.* at 716. "It was as intimately a part of his person as would have been a money belt strapped around his waist, a wallet in his pocket, or a woman's purse actually being held in the hand of its owner." *Id.* As Justice Scalia noted in his majority opinion in *Houghton*, "if the dissent thinks 'pockets' and 'clothing' do not count as part of the person, it must believe that the only searches of the person are strip searches." 526 U.S. at 303 n.1; *Funkhouser*, *supra* at 716-17.

In *Funkhouser*, as in the case at bar,

> *On appeal the State now advances an additional theory of* Fourth Amendment justification that it had *not advanced* before Judge Lerner *at the suppression hearing.* It now claims that the

> same probable cause that justified the *Carroll* Doctrine *search of the Jeep Wrangler* was, *ipso facto*, probable cause to *arrest Funkhouser* and that the search of Funkhouser's person, including the "fanny pack," *was a search incident to lawful arrest.*

Id. at 717 (emphasis added).

The Court of Special Appeals held that the State failed to preserve that argument for appellate review. *Id.* "The exception to the warrant requirement for a search incident to lawful arrest was never mentioned, let alone argued," at the suppression hearing. *Id.* "[I]t was the State that was objecting, on very specific grounds, to the exclusion of evidence." *Id.* "The State, in effect, was objecting to the exclusion of evidence on the specific ground that its warrantless seizure was justified by the *Carroll* Doctrine." *Id.* "'[T]he objector is bound by the grounds he states, and he normally is deemed to have waived any objection to the evidence on a ground not stated.'" *Id.*, quoting *State v. Kidd*, 281 Md. 32, 39, 375 A.2d 1105 (1977). The Court cited with emphasis, *inter alia*, *Chertkof v. Dept. of Natural Resources*, 43 Md. App. 10, 16, 402 A.2d 1315 (1979) (*"the Respondent would be precluded from raising a theory in this appeal upon which it now relies for the first time.... A petitioner is bound to the theory he elects to pursue at trial."*)

After the canine alerted, inside the car, to the driver's seat, but no drugs were found in the car, the police had probable cause to arrest Funkhouser, the sole occupant. *Id.* at 721. Instead, they searched his "fanny pack," then arrested him. *Id.*

> The Court of Special Appeals held,
>
> Probable cause to believe that a person is carrying evidence does not justify a warrantless search of the person any more than probable cause to believe a home contains evidence justifies a

> warrantless search of a home. Only places or things enjoying a lesser expectation of privacy, such as automobiles, are vulnerable to probable-cause-based warrantless searches for the purpose of discovering and seizing evidence of crime.
>
> That the police have probable cause for a lawful arrest of a person does not in and of itself justify a warrantless search of that person. The search must be incident to an arrest itself. It may not be incident merely to good cause to make an arrest. The existence of an unserved warrant of arrest, for instance, would not justify a warrantless search of a person who is not actually arrested. As this Court observed in *DiPasquale v. State*, 43 Md.App. 574, 577, 406 A.2d 665 (1979):
>
> > *That the facts here might have established probable cause for an arrest of the Appellant*, even before the baggie was seized, and for a good search incident thereto which would have produced the baggie *is beside the point. No arrest was made until after the seizure and the arrest was predicated on the observation of the thing seized.* (Emphasis supplied).

Id. at 724-25.

In *Funkhouser*, the Court of Special Appeals noted that the State's argument was the same one rejected by this Court in *Knowles v. Iowa*, 525 U.S. 113, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998). There, the Iowa police had both probable cause and lawful authority to make a custodial arrest of Knowles for a speeding violation. Instead, they first issued a traffic citation and elected to search the car. 525 U.S. at 115. Finding drugs, they arrested the driver. *Id.*

On appeal, this Court reversed, reasoning that only a custodial arrest will support a warrantless search incident to arrest. *Id.*, 525 U.S. at 115-117.

See also *Bouldin v. State*, 276 Md. 511, 515-16, 550 A.2d 130 (1976) (*"the record must satisfactorily demonstrate that an arrest was in fact consummated*

before a warrantless search incident thereto may be found to be lawful") (emphasis added); *Sibron v. New York*, 392 U.S. 40, 63, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968)("It is axiomatic that an incident search may not precede an arrest and serve as part of its justification."); *Anderson v. State*, 78 Md. App. 471, 480-81, 553 A.2d 1296 (1989) ("the exception, by its very name as well as its *Raison d'etre*, is *'search incident to arrest'* and not *'arrest incident to search'*")(emphasis added).

As in the case at bar, the State argued in *Funkhouser* that because "the arrest followed the search almost immediately thereafter," it was 'essentially contemporaneous.'" *Id.* at 731. But that Court held:

> In this case it is clear, however, that no decision to arrest Funkhouser had been made and that the seizure and search of the "fanny pack" was no mere incident of an arrest already in motion, even if moments behind, on a parallel track. It was, rather, the finding of suspected drugs in the "fanny pack" that was the precipitating or catalytic agent for Funkhouser's arrest in this case. There is no suggestion that Funkhouser was going to be arrested regardless of what the search of the "fanny pack" revealed. This was an arrest incident to search.

Id. at 731.

See also *Smith v. Ohio*, 494 U.S. 541, 543, 110 S.Ct. 1288, 108 L.Ed.2d 464 (1990) (wherein the police grabbed and searched a paper grocery bag which Smith was carrying very "gingerly" and attempting to shield from the police; held: "an incident search may not precede an arrest," and the exception "does not permit the police to search any citizen without a warrant or probable cause so long as an arrest immediately follows.").

In sum, the *Funkhouser* holding was: (1) the warrantless search of the "fanny pack" worn by the defendant cannot be justified as a *Carroll* Doctrine search, because an occupant is not "a searchable extension of the car"; and (2) the State's alternate theory, even if properly preserved, that the search was incident to a lawful arrest fails, because there was no antecedent arrest. *Id.* at 734.

The instant case

Respondent submits that the record in the instant case is crystal clear, on the following points: (1) the State did not argue, at the suppression hearing the only theory advanced, for the first time on appeal, that the search of Wallace was "incident to a lawful arrest"; (2) the police told the occupants that they would be "searched," because the dog alerted to the exterior of the car, (Pet. App. at 4a); (3) Respondent Wallace was not handcuffed, until the officer who "searched" him felt a "hard object" inside his pants which was "balled up" and "the size of your fist," but which he admittedly knew was not a weapon, (Pet. App. at 5a, 27a); (4) the officer testified, "There is no question....it was a search;" (5) after detecting the round object, the officer "let him know that I was going to remove it,"; (6) then, the officer handcuffed Wallace, telling him "that I was going to place him in handcuffs but he was not under arrest. It was just for my safety and his safety to be placed in handcuffs," (Pet. App. at 27a); as the officer "moved" Wallace away from the curb up onto a grassy area, Wallace began moving his "whole body" and his "hips back and forth," until the round object fell down his pants leg and protruded from beneath the cuff of his pants. (Pet. App. at 27a).

From the cases cited herein, it is also clear that the State waived the issue of whether or not this was a "search incident to arrest," the only argument it later made on appeal. *Funkhouser*, *Kidd*, *Chertkof*, all *supra*.

Furthermore, if preserved, the State's sole argument would fail, because: (1) this was clearly a "search" which preceded and was intended to justify the ensuing arrest; and (2) it was not a search incident to a lawful arrest, where the search of the passenger, based solely on the alert to the exterior of the car, was unlawful.

Trial counsel noted in argument that the State's position in this case has disturbing implications for those who use public transportation, as well as private cars. For the first time, the State now claims the right to arrest and search all passengers in any vehicle, merely because a trained drug dog alerts to the exterior of the vehicle. For passengers in a bus, train car, trolley car or taxicab, let alone a private car, this would be an unprecedented intrusion and a clear departure from Fourth Amendment case law.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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